United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2549

To be argued by
DANIEL J. PYKETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2549

UNITED STATES OF AMERICA,

Appellee,

—v.—

DOMINIC MECCA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Dominic Mecca appeals from a judgment of conviction entered on November 22, 1974 in the United States District Court for the Southern District of New York following a six day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 73 Cr. 1102, filed on December 7, 1973, charged appellant and ten others in Count One with conspiracy to distribute and possess with intent to distribute controlled substances and in Count Two with possessing with intent to distribute approximately 500 pounds of marijuana in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(B) and 846.

Trial commenced September 16, 1974 and concluded on September 23, 1974, when the jury found appellant guilty

on both counts of the indictment.* On November 22, 1974 appellant was sentenced to concurrent terms of one year imprisonment on each of Counts One and Two to be followed by a two year term of special parole. He is at liberty pending this appeal.

Statement of Facts

The Government's Case

In November 1972 appellant Dominic Mecca and defendants Robert Wilner and Richard Belanger began establishing an offshore charter fishing business, the purpose of which was to smuggle marijuana from Jamaica to the United States under the guise of a legitimate fishing enterprise. They incorporated the business under the name Air Seas Charter, Inc., and purchased a 49 foot Cigarette racing boat which they rigged with a tuna tower (Tr. 31).**

Richard Thurlow was hired to supervise the construction of the boat (Tr. 31). When the bills began to mount, plans were made to make a trip to Jamaica to purchase marijuana so it could be sold at a profit to cover their expenses. (Tr.

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* Seven co-defendants named in the indictment were tried separately in May, 1974. In that trial defendants Wilner, Belanger and Vissa were convicted on both counts of the indictment. Defendants Smith, Calabro, Gary Stephan and Paul Stephan were found not guilty. Wilner was sentenced on December 2, 1974 to a one year suspended term of imprisonment on Count One, and three years probation on Count Two. Belanger was sentenced on July 12, 1974 to concurrent one year terms of imprisonment with a two year term of special parole to follow. Vissa was sentenced on July 12, 1974 to concurrent one year terms of imprisonment, the execution of six months of which was suspended, and was placed on probation for six months, with a two year term of special parole to follow. Wilner, Belanger and Vissa each has appealed their convictions. Palmer pled guilty to Count One on May 6, 1974, was fined $2,500 and placed on probation for three years. Coviello is awaiting trial. Adams is a fugitive.

** "Tr." refers to the trial transcript; "GX" refers to government's exhibits in evidence; "a" refers to the appendix.

36, 37) Wilner, who had been taking flying lessons and who owned an airplane, recruited defendant Richard Palmer, his flight instructor, and together with Belanger, Mecca and Thurlow they searched for, and found, a deserted island with a landing strip in the Bahamas (Tr. 337). Plans were then made to fly five to seven hundred pounds of marijuana from Jamaica to the deserted island where a boat operated by Thurlow would pick it up. Since the boat Thurlow was converting was not in operating condition, a new boat was purchased with funds contributed by defendant Adams (Tr. 50). Palmer, who was cooperating with Customs officials, informed a Customs agent of the plans that were being made and on two occasions taped conversations among Wilner, Belanger, Mecca and himself as they discussed the operation. These tapes were played for the jury (Tr. 357, 371).

In March 1973 Palmer and Wilner flew to Jamaica where they were met by Mecca and Belanger, who helped load the marijuana on the plane (Tr. 382). The marijuana was then flown to the deserted island and left under some bushes. Palmer and Wilner returned to Miami where they informed Thurlow of their success. Palmer also informed the Customs officials (Tr. 386, 387), and when Thurlow and Steven Smith, another deckhand whom Thurlow had recruited, went to the island by boat to pick up the marijuana, they were arrested and the marijuana was seized by United States and Bahamian officials (Tr. 67). Thurlow and Smith were subsequently tried and convicted in the Bahamas.

The operations of Air Seas Charter Inc. continued in spite of the unsuccessful trip. Palmer, however, stopped informing Customs officials about the group's activities. In May 1973 Palmer and Robert Vissa flew to Jamaica where they were met by Dominic Mecca (Tr. 398, 399). Approximately 500 pounds of marijuana was loaded on the plane and subsequently dropped from the plane to a boat and

brought to Miami. The marijuana was then driven to New York in two cars operated by Anthony Coviello and Gerald Mitchell (Tr. 172-177). The possession of this 500 pounds of marijuana in the Southern District of New York is the subject of the second count of the indictment. Two additional trips were made in June and August 1973 involving several of the named defendants. The method of operation was basically the same as in the previous trips. In June, however, Mitchell was arrested on the New Jersey Turnpike as he was transporting approximately 255 pounds of marijuana by car from Miami to New York.

The Defense Case

Mecca called four character witnesses (Tr. 595-609). He did not testify in his own behalf.

ARGUMENT

POINT I

The District Court properly denied without a hearing the motion to suppress a tape recording of a conversation among Mecca, Wilner, Belanger and Palmer.

At trial the Government introduced in evidence a tape recording of a conversation (GX 40B) among Mecca, Wilner, Belanger and Palmer which occurred on February 22, 1973 during the course of the conspiracy. When the conversation was recorded, Palmer was serving as an informant for the Bureau of Customs and consented to having the conversation monitored. Palmer wore a transmitting device which enabled a government agent to monitor and record the conversation (16-17a). Mecca claims that Judge Lasker erred in denying his motion to suppress the tape recording without granting him an evidentiary hearing. This contention is frivolous.

The conversation in question was recorded with the consent of Richard Palmer, the informant (16a). Since the recording was the product of the consent of one of the parties to the conversation, appellant's Fourth Amendment rights were not violated. *United States* v. *White*, 401 U.S. 745, 751-54 (1971); *Hoffa* v. *United States*, 385 U.S. 293, 302-03 (1966); *United States* v. *Bonanno*, 487 F.2d 654, 657-58 (2d Cir. 1973); *United States* v. *Kaufer*, 406 F.2d 550, 551-52 (2d Cir.), *aff'd*, 394 U.S. 458 (1969); *United States* v. *Fanning*, 477 F.2d 45, 48 (5th Cir.), *cert. denied*, 414 U.S. 1006 (1973). Moreover, appellant's Fifth Amendment privilege against self-incrimination was not infringed as a result of the recording, since his statements were not the subject of any governmental "compulsion". *Hoffa* v. *United States*, *supra*, 385 U.S. at 303-04.

The only factual question to be resolved in this case was the issue of Palmer's consent. Since Palmer testified at trial concerning the issue of consent (16a) and was subject to cross-examination by appellant, there was no need for an evidentiary hearing. The evidence of consent was uncontradicted. The papers submitted in support of appellant's motion to suppress (13-15a) laid no foundation whatsoever for the holding of a hearing, *Lawn* v. *United States*, 355 U.S. 339, 348-49 (1958), since they completely failed to establish that electronic surveillance had been illegally employed. *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *United States* v. *Magaddino*, 496 F.2d 455, 459-60 (2d Cir. 1974). See also, *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960); *Cohen* v. *United States*, 378 F.2d 751, 760-61 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967); *United States* v. *Cranson*, 453 F.2d 123, 126-27 (4th Cir. 1971).

As this Court recently said in an analogous context:

> "The moving papers themselves disclosed the inadequacies of the defendants' cases, and the oppor-

tunity to present live witnesses would clearly have been unavailing. *United States* v. *Slutsky*, Dkt. No. 74-2004 (2d Cir., April 18, 1975), slip op. 2981 at 2987.

POINT II

The trial judge correctly refused to submit the defense of entrapment to the jury.

Mecca contends that his conviction should be reversed because Judge Lasker refused to submit his defense of entrapment to the jury. The argument is completely lacking in merit.

In this Circuit the defense of entrapment presents two separate factual issues of resolution: "(1) Did the agent induce the accused to commit the offense charged in the indictment; (2) If so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense? On the first question the accused has the burden; on the second the prosecution has it." *United States* v. *Sherman*, 200 F.2d 880, 882-883 (2d Cir. 1952). See also *United States* v. *Russell*, 411 U.S. 423 (1973); *United States* v. *Rosner*, 485 F.2d 1213, 1221-22 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

While this Court has said that the defendant's burden to show that the Government induced him to commit the crime is "relatively slight", *United States* v. *Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970), the proof at trial in the present case failed to show any inducement whatsoever by a government agent.*

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* Judge Learned Hand in *United States* v. *Sherman*, *supra*, 200 F.2d at 883, defined inducement to include "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged." But see *United States* v. *Berry*, 362 F.2d 756, 758 (2d Cir. 1966) ("Mere solicitation on the part of the Government does not by itself constitute entrapment. . . .")

The proof showed that long before Palmer, the Government informer, became involved with Mecca, the latter had joined with other co-conspirators to set up a corporation to operate ligitimate fishing operation as a cover for the illegal smuggling of marijuana (Tr. 28-30). There also was testimony that more than a year before Palmer met Mecca, the latter and co-conspirator Thurlow smuggled 550 to 600 pounds of marijuana into the United States from Jamaica (Tr. 28). The trial judge found that there was no proof that Palmer induced appellant to commit the crimes charged (Tr. 447). In fact, the conspiracy continued after the March 1973 trip, although Palmer did not continue to act as a Government informant. Certainly as to the second count of the indictment, possession with intent to distribute of five hundred pounds of marijuana in May, 1973, there can be no issue of entrapment, since no government agent took part in the May activities.

Whether the defendant is required to prove inducement by a preponderance of the evidence, *United States* v. *Thomas*, 351 F.2d 538, 539 (2d Cir. 1965) or whether he must merely come forward with some evidence of government initiation of the illegal conduct, *e.g. United States* v. *Braver*, 450 F.2d 799, 805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972), the result in this case is the same, because Mecca did not come forward with *any* evidence to show inducement.

But even if the proof had shown inducement, there was still no issue of entrapment for the jury:

> "Submission [of the entrapment issue] to the jury is not required if uncontradicted proof has established that the accused was ready and willing without persuasion and to have been awaiting any propitious opportunity to commit the offense" *United States* v. *Riley*, 363 F.2d 955, 959 (2d Cir. 1966); *United States* v. *Braver*, *supra*, 450 F.2d at 805.

★ U. S. Government Printing Office 1975— 614—213—500

On April 30, 1975 I served 2 copies of the within brief on Samuel Boxer Esq, by depositing them in the mailbox at the U.S. Courthouse in an envelope addressed to Samuel Boxer Esq, 129 Court Street, White Plains, New York

David J Pyfatt
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